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No. 330

Nos. _____ and _____, *Consolidated.*

In the Supreme Court of the United States

October Term, 1955.

KIAMICHIE CHURCH and JANELLA CHURCH,
Petitioners,

vs.

WINDROP INGERSOLL and FRANCES INGERSOLL,
Respondents.

PETITION for WRIT of CERTIORARI

To the United States Court of Appeals for the Tenth Circuit.

GERALD B. KLEIN,
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INDEX.

	PAGE
Citations to Opinion Below	1
Jurisdiction	1
Question Presented	1
Statement	2
Reasons for Granting the Writ	3
Conclusion	6
Appendix A.—Opinion of United States Court of Appeals, Tenth Circuit, in No. 5298, Kiamichie Church and Janella Church *vs.* Windrop Ingersoll and Frances W. Ingersoll, and No. 5299, same *vs.* same, filed in U. S. C. A., 10th Cir., May 22, 1956	7

TABLE OF CASES.

Dauphine v. Industrial Acci. Comm., 57 Cal. App. 949, 135 P. 2d 644	5
Hurley v. Lowe, Ct. of App., Dist of Col., 168 F. 2d 553	5
Kadlecik v. L. N. Renault & Sons, Inc., et al., 156 Pa. 586, 40 Atl. 2d 866	5
Los Angeles Jewish Comm. Council v. Industrial Acci. Comm., 94 Cal. App. 2d 65, 209 P. 2d 991	4
R. J. Allison, Inc., v. Boling, et al., 192 Okl. 213, 134 P. 2d 980	4
Robinson v. George, 16 Cal. 2d 238, 105 P. 2d 914	5
State Compensation Ins. Fund v. Indust. Acci. Comm., 89 Cal. App. 197, 264 Pac. 514	5
Thurston Chemical Co. v. Casteel, decided April 6, 1955, 285 P. 2d 402, ... Okla. ....,	3
Voehl v. Indemnity Ins. Co. of America, 288 U. S. 162, 77 L. ed. 676, 53 Sup. Ct. 37, 87 A. L. R. 245	3

STATUTE.

U. S. C., Title 28, Sec. 1254 (1)	1

TEXT BOOK.

Campbell on Workmen's Compensation, Vol. 1, Sec. 184, p. 173	4

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1955.

Nos. ..... and ....., *Consolidated.*

KIAMICHIE CHURCH and JANELLA CHURCH,
Petitioners,

vs.

WINDROP INGERSOLL and FRANCES INGERSOLL,
Respondents.

PETITION FOR A WRIT OF *CERTIORARI*
To the United States Court of Appeals for the Tenth Circuit.

Petitioners pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled cases on May 22, 1956.

Citations to Opinion Below.

The opinion of the court below is unreported and is printed in Appendix A hereto, page 7.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Question Presented.

The consolidated cases here involve a question of great importance, one of public interest and presents an unusual situation. The question is whether or not the exception to

the general "going and coming" rule known as the "special errand" rule applies in a common-law action for damages as a result of negligence.

Under the general rule (the "going and coming" rule) in relation to agency, an accident in which an agent is involved may not be within the scope of his agency if he is going to work or coming home from work. An exception to this rule, the "special errand" rule has been applied by the Supreme Court of the United States in workmen's compensation cases but not in common-law actions.

Statement.

The sole question to be determined in these cases is whether or not Walter Kimberlern was the servant and agent of the respondents (both residents of Oklahoma) and acting within the scope of his employment at the time of the accident with petitioners' car (residents of California).

Respondents were operating ranch properties in Rogers County, Oklahoma, and had as an employee one Walter Kimberlern who had worked on Saturday, October 10, 1953. At the close of the day Kimberlern was asked by his employer, the respondent, if he would work for a short period of time on the following day—Sunday—normally and usually Sunday was not one of Kimberlern's regular work days, but was his day of rest. Kimberlern worked a few hours on Sunday morning and while returning home from his work on Sunday morning in his own truck he had an accident with the car in which petitioners were riding.

Here there is no dispute but that Kimberlern was the agent, servant and employee of respondents, and there is no dispute but that he did not work on Sundays. It is also clear that Kimberlern was asked as a special favor to the

respondents to come from his home on a Sunday to do two, three or four hours' work. If this special request had not been made and if Kimberlern had not followed his employer's direction and request, he would have remained at his home on the Sunday involved.

REASONS FOR GRANTING THE WRIT.

The decision of the court below is in conflict with the rule announced by the Supreme Court of the United States, in the case of *Voehl* v. *Indemnity Insurance Company of America*, 288 U. S. 162, 77 L. ed. 676, 53 Sup. Ct. 37, 87 A. L. R. 245 (1933), which involved a workmen's compensation case. There Voehl, an employee, filed a claim for compensation for an injury sustained through an automobile accident while he was on his way to his employer's place of business on Sunday, for the purpose of performing the duties assigned to him. The Court held that Voehl was on a special errand for his employer because he did not work regularly on Sundays. The Court states in part:

> "Service in extra hours or on special errands has an element of distinction which the employer may recognize by agreeing that such service shall commence when the employee leaves his home on the duty assigned to him and shall continue until his return. An agreement to that effect may be either expressed or may be shown by the course of business. In such case the hazards of the journey may properly be regarded as hazards of the service and hence within the purview of the Compensation Act."

Oklahoma has followed the *Voehl* case, *supra*. In *Thurston Chemical Co.* v. *Casteel*, decided April 6, 1955, 285 P. 2d 402, ... Okl. ..., the employee worked regular hours from

8 A. M. to 4:30 P. M. each day. On June 16, 1953, at the close of his regular day Casteel was directed to return to work the next day at 4 A. M. to clear a storage bin so that the regular work crew could carry on their work the next day during regular working hours. On the way to work at 3:30 A. M. he was injured.

In *R. J. Allison, Inc.*, v. *Boling, et al.*, 192 Okl. 213, 134 P. 2d 980, the employee's regular working hours were from 8 A. M. to 6 P. M. He was asked to return after his regular working day and repair a truck. After making the repairs he started home and was injured. The Court held that the employee was acting under the "special errand" rule and which is the exception to the "coming and going rule." The Court said:

> "The general rule that an injury suffered by an employee while on his way to or from his regular work does not arise 'out of and in the course of his employment,' as that expression is used in the Workmen's Compensation Law (85 O. S. 1941, Sec. 11), does not apply where the employee sustains an accidental injury while going to or returning from his place of work (1) to perform a special task, outside his regular working hours, and at the request of his employer, or (2) where the employer agrees, as an incident to the employment, to transport the employee to and from his place of work."

California in a number of Workmen's Compensation cases has followed this rule. In the case of *Los Angeles Jewish Community Council* v. *Industrial Accident Commission*, 94 Cal. App. 2d 65, 209 P. 2d 991, quotes from Campbell on Workmen's Compensation, Vol. 1, Sec. 184, page 173, as follows:

> "Where an employee is requested by his employer

to return and do 'a service outside his regular duty,' the sole purpose of which was to help his employer in the latter's business, a different rule applies, and the employee is then on a special errand. The special request for unusual service is the decisive factor which brings the employee, throughout the entire trip to and from the place of business, in the course of rendering a service for the employer."

Other California cases are as follows:

Dauphine v. *Industrial Accident Comm.*, 57 Cal. App. 949, 135 P. 2d 644;

Hurley v. *Lowe*, Court of Appeals, District of Columbia, 168 F. 2d 553;

Kadlecik v. *L. N. Renault & Sons, Inc., et al.*, 156 Pa. 586, 40 Atl. 2d 866;

State Compensation Insurance Fund v. *Industrial Accident Comm.*, 89 Cal. App. 197, 264 Pac. 514.

We have found only two cases from state courts which have considered the "special errand" rule in common-law actions. Both cases followed the "special errand" rule. The cases are:

Robinson v. *George*, 16 Cal. 2d 238, 105 P. 2d 914;

Kadlecik v. *L. N. Renault & Sons, Inc., et al.*, 156 Pa. 586, 40 Atl. 2d 866.

We see no reason why a distinction should be made of the "special errand" rule in common-law actions as distinguished from Workmen's Compensation cases. If the rule is applicable in the latter type of a case it should be applicable in common-law actions.

Conclusion.

For the foregoing reasons this writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

(PUBLISH: United States Court of Appeals, Tenth Circuit, May 31, 1988, Robert E. Cunningham, Clerk.)

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

—

Number 87-[illegible].

Kiamichi Church and Jamelia Church, Appellants,

vs.

Woodrop Ingersoll and Frances W. Ingersoll, Appellees.

—

Number 87-[illegible].

Kiamichi Church and Jamelia Church, Appellants,

vs.

Woodrop Ingersoll and Frances W. Ingersoll, Appellees.

—

Appeal from the United States District Court for the Northern District of Oklahoma.

—

Robert A. Neeb, Jr., and Floyd L. Ellsman (Jenny Gimmler and Valjean Biddison were with them on the brief) for Appellant;

Bryan W. Tabor (Truman B. Hucker and Ralph Rowland were with him on the brief) for Appellees.

—

Before Murrah and Pickett, Circuit Judges, and Hill, District Judge.

Murrah, Circuit Judge.

—

The sole question on this appeal is whether one Walter Kimberlern was acting in the scope of his employment as

an agent of the appellees when he was involved in an automobile accident, resulting in injuries to the appellants.

The question is presented under undisputed facts to the effect that Kimberlern was employed by appellees as a ranch hand on an hourly basis. He lived about ten miles from the appellees' ranch and did not enter upon his duties until he reached the ranch. Appellees did not undertake to provide transportation to and from Kimberlern's home, and exercised no control whatsoever over his coming or going. He traveled in his own pickup truck at his expense. Kimberlern did not ordinarily work on Sundays, but on Saturday prior to the accident, agreed to return to the ranch on the next day in order to complete the movement of cattle from one location on the ranch to another. Accordingly, on the following Sunday morning he drove his truck to one of the appellees' ranches. After parking his truck, he took the employer's truck, went to another ranch, completed the task of moving the cattle before noonday. He returned to the first ranch, left his employer's truck, and while driving his own truck home became involved in the accident for which the appellants seek to hold the appellees liable.

The parties commendably submitted to the trial court the issue of agency under Rule 42(b) F.R.C.P., pursuant to which the trial court found that Kimberlern was not at the time of the accident acting within the scope of his employment as an employee of appellees, and the complaints were therefore dismissed.

On appeal, the appellants concede the so-called "coming and going" rule to the effect that an employee is not within the scope of his employment while going to or returning from his regular place of work, unless it is shown that the coming and going is in some way connected with the actual performance of an act within the scope of his employment. And see *Thurston Chemical Co.* v. *Casteel*, 285 P. 2d 403; *Voehl* v. *Indemnity Ins. Co. of America*, 288 U. S. 162; *Wilson & Co., Inc.*, v. *Shaw*, 10 P. 2d 488; Annot.

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140 A.L.R. 1150 § IV. The appellants rely, however, upon the so-called "special errand" or "special mission" exception to the coming and going rule, usually recognized and applied in workmen's compensation cases, to the effect that if a personal injury is sustained by an employee while coming or going in pursuance of a "special errand" assigned him by his employer outside the employee's regular working hours, such injury is deemed to arise out of and in the course of the "special errand" employment, hence compensable. See cases collected 5 Blashfield Cyclopedia of Automobile Law and Practice, Perm. Ed., § 3041 p. 387.

The exception has been applied in a variety of cases, all of which ultimately rest upon the underlying precept that acts done by a servant while about his master's business are in the scope of his employment with all consequent jural relations. The exception was recognized and applied in *R. J. Allison, Inc.*, v. *Boling*, 134 P. 2d 980, where the injury occurred outside the regular working hours and while the employee was on a trip to perform a special task at the request of the employer. And see *Thurston Chemical Co.* v. *Casteel, supra.* It was applied to a coming and going deemed an "extraordinary event" in *Los Angeles Jewish Com. Council* v. *Industrial Acc. Com.*, 200 P. 2d 991. And, it was also applied to an employee whose trip to the office was interrupted by a mission of his own, but who had returned to his course of duty before the accident. *Dauphine* v. *Industrial Accident Com.*, 135 P. 2d 644. And see *State Compensation Ins. Fund* v. *Industrial Accident Com.*, 264 P. 514.

The exception was rejected in a suit for damages where the ranch hand was to report at the home ranch before entering upon his duties, but went to another ranch of the employer instead, and was involved in an accident before reaching the home ranch. The court said that the trip to the other ranch was not on the business of his employer, nor pursuant to any instruction given by him; that the employee "was in fact merely going to work and was not act-

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ing within the scope of his employment, which employment did not begin until he reported for work at the home ranch." *People* v. *Russell,* 139 P. 2d 661.

We need not indulge in any nice distinction between the term "arising out of and in the course of employment," which is liberally construed to afford coverage under workmen's compensation acts for personal injuries to employees, and the term "scope of employment," which measures a master's vicarious liability for the acts of his servants under the common law doctrine of respondeat superior. But see *Conversions & Surveys of Roach,* 204 F. 2d 490; *Frankle* v. *Twedt,* 47 N. W. 2d 482; *Hardware Mutual Casualty Co.* v. *Standard Coffee Co., Inc.,* 2 So. 2d 89. For, accepting the full sweep of the "special errand" exception as applied in workmen's compensation cases, we think the trial court was eminently correct in its refusal to apply the exception to the facts in this case. In our case the employee merely returned to his employer's ranch on Sunday to complete a regular task he had not finished on Saturday. The only resemblance to a special mission or errand was the fact that our employee did not ordinarily work on Sunday. We do not believe this fact, standing alone, is sufficient to bring the case within the exception.

The judgment is AFFIRMED.

INDEX.

	PAGE
Statement of facts	1
Was Walter Kimberlern in the course and scope of his employment as an agent of the respondents at the time and place of the accident?	2-3
Reasons for not granting a Writ	3

TABLE OF CASES.

Conversions and Surveys, Inc., v. Roach, 204 F. 2d 499 (U. S. C. A., 1st Cir.)	4
Drake, et al., v. Specht, 175 Okl. 414, 53 P. 2d 235	5
Freemont Creamery Co. of Lawton v. Carsten, et al., 175 Okl. 592, 55 P. 2d 757	5
Kadlecik v. L. N. Renault and Sons, Inc., 156 Pa. 586, 40 Atl. 2d 866	3
P. F. Collier and Sons Distributing Corp. v. Drinkwater, 81 F. 2d 200 (C. A., 4th Cir.)	5
Robinson v. George, 16 Cal. 2d 238, 105 P. 2d 914	4
Singh, et al., v. Furuta, et al., 23 Cal. App. 721, 139 P. 2d 644	4
Spartan Aircraft Co. v. Jamison, 181 Okl. 645, 75 P. 2d 1096	5
Wilson and Company, Inc., v. Shaw, 157 Okl. 34, 10 P. 2d 448	4

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1955.

No. 330

KIAMICHIE CHURCH and JANELLA CHURCH,
Petitioners,

vs.

WINDROP INGERSOLL and FRANCES INGERSOLL,
Respondents.

RESPONSE TO PETITION FOR WRIT OF *CERTIORARI.*

Statement of Facts.

Respondents own and operate a ranch in Rogers County, Oklahoma. Walter Kimberlern worked on the ranch as an employee of the respondents, along with several other employees, doing any and all general types of work as necessary on a ranch. He was paid weekly on an hourly basis.

Kimberlern lived about 10 miles from this ranch. He owned a pick-up truck. He used it as transportation to and from his home to work. He did not use the truck on the ranch or for his employer. He was not furnished gasoline nor mileage on his truck. He bought his own gasoline and furnished his truck for his own convenience.

Kimberlern and other employees worked each day of the week including Saturday but usually not on Sunday. Kimberlern and other employees worked on Saturday, October 10, 1953, moving cattle from one part of the ranch to another. They did not quite finish. Respondents asked em-

ployees if they would like to come back and work on Sunday or not. Some of them wanted to, including Kimberlern, some of them did not want to work on Sunday. Kimberlern and those who volunteered to work on Sunday reported to work, about 7:00 a. m. Sunday, October 11, 1953, and finished about 10:30 a. m. Kimberlern drove his pick-up truck from his home to work early in the morning. He finished his job, his day's work being over, he returned to his pick-up truck, got in the truck and started home when, several miles from the ranch on his way home, he was involved in an accident out of which this litigation arose. It will be stressed again that respondents did not own any interest in the pickup truck owned by Kimberlern, did not furnish transportation, did not furnish gasoline, did not pay mileage, and Kimberlern was doing nothing for the respondents at the time of the accident, but was on his way to his home at the end of his day's work.

Suit was filed against Kimberlern and these respondents. Respondents denied agency of Kimberlern or that he was doing anything in the scope and course of his employment. This made up the issue which was tried in the District Court for the Northern District of Oklahoma in which findings of fact and conclusions of law were made that Kimberlern was not the agent, servant or employee, nor acting within the scope of his employment for the respondents at the time the accident occurred and judgment was rendered for the respondents. On appeal to the Court of Appeals of the Tenth Circuit the judgment of the trial court was affirmed.

The only question involved in the litigation is: *Was Walter Kimberlern in the course and scope of his employment as an agent of the respondents at the time and place*

of the accident? This was resolved in favor of the respondents that there was no agency or scope of employment at the time of the accident by the trial court and by the court of appeals.

Reasons for Not Granting a Writ.

The evidence was not in dispute. The law is not in dispute as to agency and master and servant in common-law cases.

Counsel for appellants are seeking to have this Supreme Court of the United States change the general law of agency and master and servant to the rules applicable to workmen's compensation cases. Workmen's compensation cases are under the workmen compensation statutes of the respective states which are social legislation and in all cases are to be interpreted liberally in favor of the injured workmen. They are attempting to apply the "special errand" rule which has developed under Workmen's Compensation Acts, to common law actions.

Under Workmen's Compensation Acts employees who are requested by their employers to go on a special errand, to work at special request, not in the regular course of hours, do some special work that is not in their regular course of employment, have been held to be in the special errand rule and when injured, are entitled to workmen's compensation as the act provides. All the cases that are cited by the appellants are workmen's compensation cases from the different states including Oklahoma except two cases. In the case of *Kadlecik* v. *L. N. Renault and Sons, Inc.*, 156 Pa. 586, 40 Atl. 2d 866, the employee was sent on a special mission by the president of the company and while going out of town on that special mission, the court held

the employee to be in the scope of his employment which is the general rule. The other case the appellants cite which is not a workmen's compensation case is *Robinson* v. *George*, 16 Cal. 2d 238, 105 P. 2d 914, in which an employee of a newspaper company had a special arrangement with his employer. He was subject to call at any time after 6:00 o'clock to deliver papers or visit those patrons who had complaints. His pay depended upon different zones of the town in which he had to travel. The employee was called at his home and had to start on his mission from home and return to home. The court held that this was a special mission since he was subject to call, and was an agent and in the scope of his employment while on such special mission, to and from his home since he started from his home. These two cases are not in any way analogous to the case here in which appellants are seeking a writ of certiorari.

The common law rule of *respondeat superior* is well defined and is separate and distinct from principles involved in workmen's compensation cases. *Conversions and Surveys, Inc.*, v. *Roach*, 204 F. 2d 499 (U. S. C. A., 1st Cir.).

An employer is not liable at common law for injury to third parties caused by an employee going to and from work to his home. This is the general rule in Oklahoma and California and many other states. See *Wilson and Company, Inc.*, v. *Shaw*, 157 Okl. 34, 10 P. 2d 448; *Singh, et al.*, v. *Furuta, et al.*, 23 Cal App. 721, 139 P. 2d 644 (this case is almost identical to the case at bar both in fact and in law),

The grounds of a master's liability for the servant's negligence is not that servant represents the master in such negligent act, but that he is conducting the affairs of a master who must see that they are conducted without injury

to others. The test of a master's liability for negligent act or omission of his alleged servant is his right to control his alleged servant in the performance of an act or omission and at the very instant of its performance or neglect. See *P. F. Collier and Sons Distributing Corp.* v. *Drinkwater,* 81 F. 2d 200 (C. A., 4th Cir.).

It is a general rule in Oklahoma that the master is the person whose business the party is engaged in at the time, and the one who has the right to control and direct the party's conduct. He is to be deemed master who has supreme choice, control, and direction of the servant and whose will the servant represents, not merely in the ultimate result of the work, but in all its details. See the following cases: *Freemont Creamery Company of Lawton* v. *Carsten, et al.,* 175 Okl. 592, 55 P. 2d 757; *Spartan Aircraft Company* v. *Jamison,* 181 Okl. 645, 75 P. 2d 1096; *Drake, et al.,* v. *Specht,* 175 Okl. 414, 53 P. 2d 235.

The trial court and the Court of Appeals of the Tenth Circuit properly followed the law as to master and servant and agency, not only in Oklahoma but which is the general rule.

For the foregoing reasons the writ of certiorari should be denied.

Respectfully submitted,

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